HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 367 of 2002

APPELLANTS

1. Akhilesh Kumar, S/o. C. Prem Bagh, 29 years.
2. Shailesh @ Shailesh Kumar, S/o. C. Prem Bagh, 22 years.
3. Kamlesh, S/o. C. Prem Bagh, 27 years.
4. Rajesh, S/o. C. Prem Bagh, 25 years.
5. Suresh, S/o. C. Prem Bagh, aged about 20 years.

All R/o. Vill. Kasturi, Gudapara, P.S. Nagar Naar, Distt. Bastar (C.G.)

Versus

RESPONDENT

State of Chhattisgarh, Through : Distt. Magistrate, Distt. Bastar-Jagdalpur.

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Prafull Bharat, counsel for the appellants.

Shri Akhil Mishra, Panel Lawyer for the State/respondent.

(DIVISION BENCH)

HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI SUNIL KUMAR SINHA, JJ.

JUDGMENT
(24.09.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J,

(1) Challenge is made to the judgment of conviction and order of sentence dated 11th March, 2002 passed by the 4th Additional Sessions Judge, Jagdalpur (Bastar) in Sessions Trail No. 6/2001, whereby, all the appellants have been convicted u/s

302/149 I.P.C. and sentenced to undergo imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 6 months. Apart from that appellants No. 1, 3, 4 & 5 have also been convicted u/s 147 I.P.C. and sentenced to undergo R.I. for 2 years and to pay fine of Rs.100/, in default of payment of fine to further undergo R.I. for 1 month and appellant No.2 has been convicted u/s 148 I.P.C. and sentenced to undergo R.I. for 3 years and to pay fine of Rs.200/, in default of payment of fine to further undergo R.I. for 2 months. The respective sentences have been directed to run concurrently.

(2) The allegation are that on 6.11.2000 at about 12 in the Noon, Kalicharan, along with his servant Gopalu, was going on a bullock-cart to the field of his uncle Yisucharan for taking paddy crops. On the way, the accused persons, armed with *Lathis* & *Tangia,* attacked him. He received many injuries resulting into his instantaneous death.

(3) The matter was reported by Yisucharan (PW-1) to police station- Nagar Naar, vide Ex.-P/1. The Investigating Officer left for seen of the occurrence, recorded a *Merg* Intimation under Ex.-P/2 and gave notice to the *Panchas* under Ex.-P/17, prepared inquest on body of the deceased under Ex.-P/3 and sent the dead body for post-mortem examination to Primary Health Centre, Nagar Naar. Site plan was prepared under Ex.-P/4. During the course of investigation, after taking accused Shailesh @ Shailesh Kumar in custody, he recorded his memorandum under Ex.-P/5, in pursuance of which, *Tangia* was seized from his possession under Ex.-P/6; memorandum of accused Akhilesh was recorded under Ex.-P/8, in pursuance of which, a *Danda* was seized from his possession under Ex.-P/9; memorandum of accused Kamlesh was recorded under Ex.-P/10 and a *Danda* was seized under Ex.-P/13; memorandum of accused Rajesh Kumar was recorded under Ex.-P/11 and a *Danda* was seized under Ex.-P/14; memorandum of accused

Suresh was recorded under Ex.-P/12 and a *Danda* was seized under Ex.-P/15. Plain soil and blood stained soil were also seized from the place of occurrence known as "Vilsan Ka Marhan" (desert land of Vilsan) under Ex.-P/7. Post-mortem examination was conducted by Dr. Sujeet Vishwas (PW-11), who prepared his post-mortem report under Ex.P/20. He noticed the following injuries on the body of the deceased:

i) Two stab injuries (Incised), 6 x 6 x 8 cm. & 6 x 7 x 8 cm on the posterior aspect of neck at middle. There were cutting of muscles, skin, vertebra (2nd – 3rd cervical vertebra space), spinal cord, major & minor vessels (artery & veins) (carotid V. + A.).

ii) Incised wound on the left side of left shoulder size 3 x 2 x 2 cm.

iii) Incised wound on the front of left shoulder size 8 x 8 x 3 cm.

iv) Abrasions on the medial aspect of right forearm, 8 cm. above to wrist- (a) size 4 x 4 cm. & (b) 3 x 2 cm.

v) Abrasion on the front of left leg (below knee) size 3 x 2 cm. ext.

According to him injuries No. 1, 2, 3 & 5 were ante-mortem whereas injury No.4 was post-mortem in nature. Injury No.1, 2 & 3 were caused by sharp object and other injuries were caused by hard and blunt object in between 6 to12 hours prior to post-mortem examination. He gave his opinion that the cause of death was shock and asphyxia due to neurogenic shock as a resulting of cutting of spinal cord at the level of C2, C3 and excessive hemorrhage.

(4) In further investigation, the seized articles were sent for chemical examination to Forensic Science Laboratory vide Ex.-P/25, from where, a report Ex.-P/27 was received. According to the said report, blood stains were found on the clothes of the

deceased, stained soil and Axe seized from the possession of accused Shailesh, whereas no blood stains were found on the plain soil.

(5) After completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate First Class, Jagdalpur, who in turn committed the case to the Sessions Judge, Jagdalpur, from where it was received on transfer by the Court of Fourth Additional Sessions Judge, Jagdalpur, where the trial was conducted.

(6) Prosecution, in order to establish their case, examined 13 witnesses, statement of accused persons were recorded under Section 313 Cr.P.C. in which, they denied the material appearing against them in the prosecution evidence and took the plea of false implication. The defence examined 6 witnesses, particularly taking the plea of *alibi*. Learned Additional Sessions Judge, after hearing the arguments of respective parties, convicted and sentenced the appellants as aforementioned.

(7) The conviction of the appellants is based upon the testimony of 3 eye witnesses namely Gopalu (PW-2), Mahesh (PW-5) & Yogendra (PW-6). The learned trial Judge held that the testimony of 3 eye witnesses are trustworthy and dependable and the plea of *alibi* raised by the accused persons was not acceptable.

(8) Learned counsel for the appellants firstly argued that the testimonies of 3 eye witnesses are not reliable and the conviction based upon their such testimonies cannot be sustained. He secondly argued that the appellants were in settled possession of the disputed field, on which, their unriped crop was standing, and, as per the prosecution case, as the complainant party started harvesting the crop, the appellants were having right of private defence of their property, which was exercised by appellant Shailesh only and other appellants have been falsely

implicated in the case. Lastly, he argued that the defence of *alibi* has wrongly been rejected.

(9) On the contrary, learned counsel for the State opposed these arguments and supported the judgment of conviction and order of sentence passed by the trial Court.

(10) We have heard the learned counsel for the parties at length and have also perused the records of the Sessions Trial.

(11) PW-2, Gopalu has deposed that on the fateful day when he was going along with the deceased Kalicharan on the bullock cart, on the way near mango tree, the accused persons appeared and they assaulted Kalicharan with *Danda*, thereafter accused Shailesh assaulted him with *Tangia*, and after seeing all this, he became unconscious. When he gained consciousness, he saw that the body of Kalicharan was lying under the bullock cart. There were 3 injuries on his neck and there was also injury of *Tangia* on his shoulder. He has specifically deposed vide Para-2 that Shailesh had assaulted Kalicharan by *Tangia* and other accused persons had assaulted him by *Danda*. In cross-examination, he has admitted that the deceased Kalicharan was son of Yisucharan. In Para-10 of his examination, he has been shown his police statement regarding saying that the accused persons came out from the bushes, which was not said by him in the court statement, except this, nothing material has been brought in his cross-examination for holding his testimony unreliable.

(12) PW-5, Mahesh is the other eye witness, who deposed that on the fateful day i.e. on 6.11.2000at about 11.30-12 in the day, he was sitting along with Yogendra and Dharmendra on a culvert (*Puliaya*) in the village. At that time Kalicharan and Gopalu were taking bullock cart towards the field. All of a sudden Shailesh and his four brothers (whom he does not known by names), assaulted Kalicharan by *Danda*, Shailesh assaulted him by *Tangia*. He has specifically deposed that all the

accused persons had came together to the seen of occurrence and after assaulting the deceased, they ran away from the seen of occurrence. In Para-3 of his deposition, he has deposed about the manner of assault and has said that he and Yogendra disclosed the incident to Yisucharan and Vishwas. In cross-examination vide Para-7, he has stated that Yisucharan and Vishwas were near the desert land of Vilsan (Vilsan Ka Marhan) and he has told the story at that place. In Para-14, he has admitted that the dead body of the deceased was lying in Vilsan's desert land. It has been argued by learned counsel for the appellants that when the place of occurrence was desert land of Vilsan and the dead body was also lying there, then the version of this witness that "he went to tell the story to Yisucharan and Vishwas, who met him near the desert land of Vilsan" appears to be false. This argument advanced by the learned counsel for the appellant does not appear to be convincing because it was just possible that they had met them, after sometime, near the desert land of Vilsan and that by itself does not render his testimony unreliable. His meeting with Yisucharan and Vishwas near the place of occurrence or at some other place is not so material to discredit his testimony.

(13) Yogendra (PW-6) has also deposed that when he was sitting with his friends Mahesh (PW-5) and Dharmendra, at about 11.30 – 12 in the day, he saw that Kalicharan was going towards the field on a bullock cart, on the way, near the culvert, there are bushes, from which, the accused persons namely Akhilesh, Suresh, Rajesh and Kamlesh appeared armed with *Danda* and they assaulted Kalicharan. Thereafter, when Kalicharan fell down, Shailesh assaulted him with *Tangia*, who received injuries on both the sides of neck and left shoulder. He has further deposed that thereafter they went to Kedar Mashih and disclosed the story to him and except Kedar Mashih, they had not disclosed the story to any body else. In cross-examination vide Para-3, he has deposed that on the said date, he was in village because there was a cricket match in the

village. The scheduled time of beginning of match was 12 Noon, but, since a murder took place in the village, the match was cancelled. The students from Nagar Naar had came at 12 Noon for playing match and when they were in his house, his brother Nirmal came and said that since the murder had taken place in the village, the play will not take place. It is argued that since this witness has admitted that he was in the house and his brother came and told him, therefore, he has not witnessed the occurrence. It was also argued that he has deposed that they had gone and had told the story to Kedar Mashih and they had not told the story to any body else, therefore, either version of Mahesh is correct, who says that the story was disclosed by him to Yisucharan, or his version is correct, who says that the story was disclosed to Kedar Mashih and none else. About the first point that his brother told him that a murder has taken place in the village, it has not been clarified by the defence in cross-examination as to when he came to know about murder? By disclosure of his brother or he was knowing about the murder and brother only said it and told that on account of murder the match will not take place. If simple meaning is given to his such statement after reading the entire paragraph (not in isolation), it would appear that his brother had only told him that they will not play the match on account of death in the village. About the factum of disclosure of story, there is contradiction. Mahesh told that he and Yogendra disclosed the story to Yisucharan and Vishwas and this witness says that they had disclosed the story to Kedar Mashih. But on such contradiction only, their entire evidence which appears to be natural and reasonable cannot be disbelieved. It is settled principle that minor contradictions which do not go to the root of the matter and which do not discredit the entire credibility of a witness cannot be given much importance to disbelieve the testimony of such witnesses. If on the entire evidence of the witness his testimony appears to be reasonable and dependable inspiring the confidence of the Court, the Court can well rest the conviction on their such testimony. It was also argued that Yogendra (PW-6) has not

deposed that he had also seen Gopalu, therefore, he should be disbelieved. This may be an omission but the question is as to whether the omission is of such a nature, on which, the entire testimony of this witness should be thrown out? In our considered opinion, only on the ground that this witness has not said that Gopalu was also there with Kalicharan, in absence of effective cross-examination on this point, his testimony cannot be discarded. The omission is not so vital which goes to the root of the matter and not naming Gopalu as a person accompanying the deceased, on the face of other evidence on record, does not make any difference in this case.

(14) Therefore, the argument advanced by the learned counsel for the appellants that these 3 eye witnesses are not reliable as they are contradicting on material facts with each other cannot be accepted. In fact, eye witnesses are not contradicting on material facts, on the contrary, they are corroborating each other on the material facts i.e. on the fact of assault being made by all the accused persons, and on the basis of minor contradictions, referred to above in their evidence, their testimony cannot be discarded.

(15) So far as right of private defence of property is concerned, this plea was not taken by the accused persons before the trial Court. Learned counsel for the appellants argued that even if the plea was not taken, that can be raised in appeal. He relied on the decision of the Apex Court in the matter of ***Kashi Ram and others –Vs- State of M.P., AIR 2001 SC 2902***. In the said case, the Apex Court held that though S. 105 of Evidence Act, 1872 enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under S. 313, Cr.P.C. or by

adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submission by relying on the probabilities and circumstances obtaining in the case.

(16) About the right of private defence, it has been observed by the Apex Court in the matter of ***Bishna alias Bhiswadeb Mahato and others –Vs- State of W.B., (2005) 12 SCC 657*** vide Paras- 74 to 78 as follows:

> **"74.** "Right of private defence" is not defined. Nothing is an offence in terms of Section 96 of the Penal Code, if it is done in exercise of the right of private defence. Section 97 deals with the subject-matter of private defence. The plea of right of private defence comprises the body or property. It, however, extends not only to the person exercising the right; but to any other person. The right may be exercised in the case of any offence against the body and in the case of offences of theft, robbery, mischief or criminal trespass and attempts at such offences in relation to property. Sections 96 and 98 confer a right of private defence against certain offences and acts. Section 99 lays down the limit therefor. The right conferred upon a person in terms of Section 96 to 98 and 100 to 106 is controlled by Section 99. In terms of Section 99 of the Penal Code, the right of private defence, in no case, extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 provides that the right of private defence of the body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein, namely, "First – Such an assault, as may reasonably cause the apprehension that death will otherwise be the

consequence of such assault; Secondly – Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.

75. Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body as well as property. It commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until there is reasonable apprehension. In other words, the right lasts so long as the reasonable apprehension of the danger to the body continues.

76. So far as exercise of the right of private defence of property extended to causing death is concerned, the same is covered by Section 103 of the Penal Code. Such a right is available if the offence, the commission of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions enumerated viz. robbery, housebreaking by night, mischief by fire committed on any building, theft, mischief or house-trespass. The said provision, therefore, has no application.

77. Section 104 provides that in relation to the offences as enumerated in Section 103, the right of private defence can be exercised to the voluntary causing to the wrongdoer of any harm other than death. Section 105 provides for commencement and

continuance of the right of private defence of property which reads as under:

"105. *Commencement and continuance of the right of private defence of property.*- The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear or instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against housebreaking by night continues as long as the house-trespass which has been begun by such housebreaking continues."

78. Section 105 of the Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also

from the attending circumstances, as may transpire from the evidence led by the prosecution itself."

(17) In the matter of ***Salim Zia –Vs- State of Uttar Pradesh, AIR 1979 SC 391***, the Apex Court said vide Para- 9 that it is true that the burden on an accused person to establish the plea of self defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.

(18) Therefore, it is clear that even if a plea of right of private defence of property was not taken by the accused persons at the stage of trial, but, if in fact, it was available to them, they may raise the plea on the probabilities and the circumstances obtaining in the case. No positive evidence although is required to be adduced by the accused and the burden of proof can be discharged by eliciting the necessary material from the witnesses examined by the prosecution and it can be established by attending circumstances as may come out from the prosecution evidence itself or it can simply be discharged by adducing the defence evidence.

(19) In the present case, admitted position is that a civil suit was pending between Yisucharan and Hastimani (mother of the appellants) and the property was claimed by both of them. During the pendency of civil suit, 145 Cr.P.C. proceedings were also drawn at the instance of the police by the Executive Magistrate and the case, which was registered on 17.10.2000 was fixed for 7.11.2000 by the said Magistrate. It comes from the evidence of DW-1, Vasudeo Mandavi (Reader of S.D.M. Court) that on 20.10.2000, copy of judgment passed by the Civil Judge Class-II, Jagdalpur in Civil Suit No. 82A/98 on 30.9.2000 was filed before the Executive Magistrate, on which, the Magistrate

dismissed the proceedings under Section 145 Cr.P.C. In the said proceedings, there was no direction by the Magistrate as to which party has to be given possession of the land. He has admitted in cross-examination that party No.2 was not informed about the proceedings of dismissal of the case, which took place on 20.10.2000. He has proved the copy of the order-sheets recorded by the Executive Magistrate on 20.8.2000, 27.9.2000, 17.10.2000 and 20.10.2000 as Ex.-D-1A.

(20) Hastimani Bai has been examined as DW-4. She has deposed that the land was possessed by her. It has also come in the evidence of PW-1, Yisucharan, vide Para-13, that the land was in possession of Hastimani Bai and on the date of incident, the crop of the said land was being harvested by them. Therefore it is clear that in fact, the land was cultivated by Hastimani (mother of the accused persons) and on the fateful day, the complainant party were harvesting the crops standing on the land. It also comes in the evidence of Hastimani (DW-4) that when she knew about harvesting of the crops, she went to the field along with her two daughters namely Dayawati and Ranjna as the accused persons were not present in the house, they had gone to their work (a plea of *alibi* has also been taken in the case), and even on their resistance, the crop, which was cultivated by them was being harvested by the complainant party and Yisucharan and Vishwas asked Gopalu and Kalicharan to bring the bullock cart to take the crop, on which they had gone from the field.

(21) Admittedly, nothing happened at the field and the incident took place at a distance of 1½ - 2 km. from the field i.e. in the desert land of Vilsan, where the deceased was assaulted by the accused persons. At that time, the crop was not loaded in the bullock cart and bullock cart was simply being taken to the field, though for the purpose of taking the crops. The question would be whether in that situation, a right of private defence of property was available to the accused persons while they assaulted the deceased at a distance of 1½ - 2 km. from the

place of occurrence (field where harvesting was going on) and whether all this was proved on record? In the facts and circumstances of the case, such right was available to be exercised at the field alone. It was available against actual offender/aggressor, who was invading the property at the place where the property situate but the said right was not available against a person, who was there at a distance of 1½ - 2 km. from the place, where the property was situated.

(22) Moreover, in the present case, another important factor is that a defence of *alibi* has been taken by the accused persons and specific evidence has been adduced by them by producing defence witness that they were not present at the seen of occurrence. Therefore, they were not affirm on their right of private defence of property. The submission is that if the plea of *alibi* fails, then protection under right of private defence of property should be given. On our independent examination, in the facts and circumstances of the case, we do not find that such exercise by the accused persons in the manner alleged, at a distance of 1½ - 2 km. from the agricultural field by ambushing and attacking the deceased while he was carrying the bullock cart to the disputed field was available to them. Therefore, the second argument raised by the learned counsel for the appellants fails and the same cannot be sustained.

(23) So far as plea of *alibi* is concerned, it has been deposed by Hastimani Bai (DW-4, the mother of the accused persons) that on the fateful day, her sons namely Kamlesh and Suresh had gone in the morning for taking wood from Manchkot forest along with Budru Isai and they had returned back at about 4.00 p.m. Her 3rd son namely accused-Rajesh had gone for labour work in the field of Motiram Rawat. His duty was from 8.00 a.m. to 12 Noon and from 2.00 to 4.00 p.m. Her 4th son namely Akhilesh had gone to work in the house of Suresh Sanwal, where he was working on monthly basis and on the fateful day, he was doing labour work in his field and he returned back to house at about 5.00 p.m. Her 5th son namely Shailesh had gone to Jagdalpur to

meet his lawyer for obtaining the copy of judgment passed by the Court. She has deposed in her cross-examination that her sons were not present in the village at the seen of occurrence. She has denied the suggestion that she is making false statement to save her sons.

(24) Budru has been examined as DW-5. He has stated that accused Kamlesh and Suresh had gone to the forest for taking wood but in examination-in-chief itself, he deposed that they had returned from the forest at about 12 Noon. The incident is said to have been taken place at about 12 Noon. Therefore, on his evidence, the evidence of DW-4 is destroyed that at the relevant time, these two accused persons namely Kamlesh and Suresh were not present in the village. On the evidence of DW-5, it is established that they were present in the village.

(25) Motiram has been examined as DW-6. He has stated that accused Rajesh had came to his field for harvesting the crop and his field is at a distance of 2 km. from the village. They had gone to the field at about 8.00 a.m., they were 4 persons, Rajesh had also gone with them. Since the harvesting work was not over, therefore, they returned at about 12 Noon in the village. On his evidence also it is established that Rajesh had returned to the village at about 12 in the Noon.

(26) So far as accused Akhilesh is concerned, DW-4 has deposed that he had gone to work in the house of Suresh Sanwal but Suresh Sanwal has not been examined in this case and since the version of DW-4, Hastimani Bai is contradicted on other points regarding 3 of her sons, on her sole testimony it cannot be held that Akhilesh was not present in the village, he had gone for work to the house of Suresh Sanwal. Similarly for Shailesh, the mother has stated that Shailesh had gone to meet their lawyer at Jagdalpur but no person from Jagdalpur has been examined to establish this fact and the ground, on which, the evidence of mother is being disbelieved for accused Akhilesh, she cannot be belied for accused Shailesh also.

(27) A peculiar feature of this matter is that in a case of right of private defence of property, as argued before us, a plea of *alibi* is also being taken. This does not appear to be reasonable. Moreover, there are 3 eye witnesses in this case namely Gopalu (PW-2), Mahesh (PW-5) and Yogendra (PW-6) and they have categorically stated about complicity of the accused persons in commission of crime in question and we have held them to be fully reliable, therefore, in light of evidence of these 3 eye witnesses, and further in light of evidence of defence witnesses, so far as question of plea of *alibi* is concerned, that cannot be accepted. This argument advanced by the learned counsel for the appellants has also no force and the same cannot be sustained.

(28) In the result, we do not find any substance in this appeal. The conviction and sentence awarded to the appellants are based on cogent, reliable and clinching evidence, which do not require interference by this Court. The appeal has no merits, the same is liable to be dismissed and is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

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